IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
*Petitioner,*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner Bessie B. Givhan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing a judgment of the United States District Court for the Northern District of Mississippi.[1]

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[1] Respondents are the Western Line Consolidated School District, Mississippi; its Superintendent, Harold N. Adams; its Board of Education; the members of its Board of Education, H. T. Cochran, W. T. Eifling, Chalmers Hobart, Wynn Starnes, Clyde Nichols, and Ivory Walker, Sr.; and James S. Leach, Principal of Glen Allen Attendance Center, a school operated by the respondent school district.

## OPINIONS BELOW

The opinion of the court of appeals, dated July 18, 1977, and reprinted as Appendix A, *infra*, is reported at 555 F.2d 1309. The district court's unpublished Memorandum of Decision, dated July 2, 1975, is attached as Appendix B, *infra*.

## JURISDICTION

The judgment of the court of appeals was entered on July 18, 1977. Appendix C, *infra*. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 27, 1977.[2] Appendix D, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1970).

## QUESTION PRESENTED

Whether a teacher's statements criticizing practices in her school which she believes to be racially discriminatory are protected by the First Amendment where those statements are communicated to her principal rather than presented in a public forum.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment XIV:

[2] Petitioner's time for filing a petition for rehearing and suggestion for rehearing en banc was extended to and including August 15, 1977.



> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes, § 1979, 42 U.S.C. § 1983 (1970):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF THE CASE

This case arises from the decision by school officials in a Mississippi school district, made during the process of school desegregation, to terminate the employment of a concededly competent black teacher, petitioner Bessie B. Givhan, because she urged her principal to modify practices in her school which she believed to be racially discriminatory. App. 9, 35-36. Petitioner sought and was granted leave to intervene in a pending desegregation case against the school district, *Ayers* v. *Western Line Consolidated School Dist. No. 1 et al.*, No. GC-66-1-S (N.D. Miss.). Her complaint in intervention alleged, *inter alia*, that the termination of her employment violated the First and Fourteenth Amendments to the Constitution and R.S. § 1979, 42 U.S.C. § 1983. The district court's jurisdiction rested on 28 U.S.C. §§ 1331 and 1343(3).

The facts relevant to this petition are drawn exclusively from the court of appeals' opinion which accepted the district court's findings of fact. App. 11, 12. Both courts found that

> "the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." App. 8-9, 35.

Specifically, Mrs. Givhan had requested her principal in conversation and in writing to assign black people to the ticket taking jobs in the cafeteria, to integrate better the administrative staff of the school, and to use black "Neighborhood Youth Corps Workers" in semi-clerical positions instead of only janitorial work. App. 6-7, 12 & n. 12, 33-34. The court of appeals noted that "[t]hese requests all reflect Givhan's concern as to impressions on black students of the respective roles of whites and blacks in the school environment." App. 6. The principal, however, considered these requests to be "constant," "petty and unreasonable demands" that manifested her "arrogance and antagonistic and hostile relationship." App. 7, 9, 33, 35. Both courts below expressly rejected the principal's characterization of Mrs. Givhan's expressions, finding that these requests were not "constant"—the principal being able to identify only two occasions when requests were made; nor were they "petty" or "unreasonable" since they "involved employment policies and practices at Glen Allen school which Givhan conceived to be racially discriminatory in purpose or effect." App. 9, 35. Thus, the district court found and the court of appeals confirmed that

> "the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination." App. 9, 35-36.

Relying on *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Perry* v. *Sindermann*, 408 U.S. 593



(1972), the district court held that the school district's decision to terminate Mrs. Givhan's employment violated her First Amendment rights. App. 36. It entered judgment granting her reinstatement and backpay. App. 2, n. 3. The court of appeals reversed the district court's ruling and remanded for further proceedings on a separate and independent claim.[3] App. 20.

The court of appeals held that this Court's decision in *Pickering* does not provide the standard by which Mrs. Givhan's First Amendment claim is to be determined. It said that *Pickering* would have required a balancing " 'between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as employer, in promoting the efficiency of the public services it performs through its employees.' " App. 12.[4] But balancing was improper here, the court ruled, because neither a teacher nor a

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[3] The unresolved claim is that the nonrenewal of Mrs. Givhan's contract was part of an overall reduction in force incident to desegregation. The *Singleton* decree requires school districts in the Fifth Circuit to apply objective employment criteria if they are implementing an overall reduction in force during desegregation. *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc). At trial, the parties stipulated to facts showing that there was no overall reduction in force. In a post-trial motion, Mrs. Givhan requested the district court to relieve her of that stipulation. The district court did not pass upon this request. It expressed a "disinclination to allow its decision on the merits to turn upon the tenuous distinction between" an increase in staff which defendants urged amounted to 16, and a reduction in staff which plaintiff urged amounted to two. App. 32. See App. 30, 31.

[4] The court of appeals noted that the school district "did not expressly defend on the ground that Givhan's expression substantially interfered with her work or with her relationship" with the principal. App. 13 n. 13. The court also noted that "[t]he district court's finding that Givhan's complaints were neither constant nor unreasonable might be taken as a finding that there was no substantial interference with her work." *Id.*

citizen has a First Amendment interest in "making complaints to the principal." App. 13, 19.[5]

In support of its ruling, the Fifth Circuit quoted liberally from decisions of this Court which hold that various types of public expression by school teachers are protected by the First Amendment. App. 14-16, citing, *e.g.*, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). The court of appeals said that these cases "illustrate the importance of protecting the right of public expression" (App. 15) and contain the "strong implication" that "private expression by a public employee is not constitutionally protected." App. 16.

The Fifth Circuit also reasoned that Mrs. Givhan's communication with her principal was outside the coverage of the First Amendment because "[n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision." App. 19.[6] "If we held Givhan's expressions constitutionally protected," the court said, "we would in effect force school principals

[5] The court of appeals also concluded that if the First Amendment protected Mrs. Givhan's expression of views to a public official, then she had established a violation of her constitutional rights within the framework of this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). The court said that the principal and the board "were motivated primarily by Givhan's 'demands' in deciding not to rehire her" and that the school district and its officers "do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.'" App. 11.

[6] The court of appeals cited (App. 18) *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737 (1970), and Justice Douglas' concurring opinion in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 305, 307 (1974).



to be ombudsmen, for damnable as well as laudable expressions." App. 20.[7]

The court of appeals was not altogether comfortable with its decision. It acknowledged that this case "could be" one of those "hard cases [that] make bad law" (App. 19); and one member of the court, Roney, J., specially concurred because there are "probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in the First Amendment terms." App. 26.

## REASONS FOR GRANTING THE WRIT

### I

The Fifth Circuit has decided an important question of constitutional law which has not been, but should be, settled by this Court.

Public employees like Mrs. Givhan, by reason of training and experience, are often better informed than other citizens about deficiencies in the programs of the agency in which they serve. See *Pickering*, *supra*, 391 U.S. at 572. Many factors, however, may cause such an employee to hesitate before publicly broadcasting his concerns. Among these are fear of reprisal, a delicate sense of professional etiquette, and personal reticence. Additionally, a public employee may feel with good reason that he can be more effective by bringing his concerns, at least initially, directly to his superiors. "Whistle blowers" make an important contribution to good government, but the public is also well served by a public employee who con-

[7] The record does not contain any evidence showing that the principal or any other official advised Mrs. Givhan to refrain from discussing her views with her principal. Mrs. Givhan testified that she believed that she was supposed to go through the chain of command and that the principal was the next link in the chain leading to the superintendent and then the board. Trial transcript, p. 134.

cludes in light of the circumstances that beneficial change is more likely to result from quiet dialogue through channels than from publicity which may embarrass agency officials or stiffen their opposition to suggested reforms.[8]

The court of appeals has fashioned a rule of constitutional law that would require a teacher or other public employee to risk his livelihood whenever he makes a reasonable suggestion to his superiors concerning important agency policies or practices. The court reasoned that the principal should not be "single[d] out" as the audience for a teacher's views unless the principal has been charged with that function. It observed, "if we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen for damnable, as well as laudable expressions." App. 20. The court, however, gave no apparent consideration to whether these divergent interests could be accommodated through regulations governing the time, place and manner in which public employees and other citizens may present concerns to appropriate public officials, *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-17 (1972); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98 (1972), and whether such accommodation is constitutionally required. In short, the decision below excises from First Amendment protection a broad category of speech—including speech of considerable public importance—even though the ends sought to be served can be fulfilled by narrowly drawn regulations which do not so sweepingly encroach

[8] The district court found that in the wake of desegregation the atmosphere in the Western Line Consolidated School District was one of "student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation in" the school district. App. 35. Mrs. Givhan reasonably could have concluded that in those circumstances a direct communication to her principal was best calculated to achieve the changes she believed were needed and least likely to fan the flames of racial strife.



upon First Amendment interests.[9] Cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *James* v. *Board of Education of Central Dist. No. 1*, 461 F.2d 566, 574 (2d Cir. 1972).

Significantly, the theory of the court of appeals in excluding direct communication with public officials from the protections of the First Amendment expressly encompasses speech by private citizens as well as public employees. The court of appeals did not base its rejection of Mrs. Givhan's claims on the conclusion that the government's interests in regulating her speech differed significantly from its interests in regulating similar speech by citizens in general. Rather it concluded that

> "[n]either a teacher *nor* a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision." App. 19 (emphasis added).

Thus, under the reasoning of the court of appeals, the First Amendment would not prevent a municipal government from revoking a citizen's library privileges or trash collection services because he complained to an official

[9] The Fifth Circuit's decision draws upon *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737 (1970), and a concurring opinion of Justice Douglas in *Lehman* v. *Shaker Heights*, 418 U.S. 298, 305, 307 (1974). These opinions are inapposite since they balance two independent constitutional rights—the right of free speech and the right of privacy. The right of privacy is not involved here since the communications were addressed to a public official during working hours and concerned matters of public importance within the purview of the official's responsibilities. This Court has at least twice cautioned against broadly applying *Rowan* in other contexts:

> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 209-210 (1975), quoting, *Cohen* v. *California*, 403 U.S. 15, 21 (1971).

who the citizen reasonably concluded was the appropriate recipient.

This Court has regarded as important and worthy of review, decisions placing a class or genre of communication outside the First Amendment. See *Beauharnais* v. *Illinois*, 343 U.S. 250, 252, 266 (1952) (malicious defamation); *Roth* v. *United States*, 354 U.S. 476, 480-81 (1957) (obscenity). *Cf. Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571, 572 (1942) ("fighting words"). The court of appeals' conclusion that a communication by a public employee or citizen with a public official reasonably perceived to be an appropriate recipient is beyond the reach of the First Amendment similarly warrants review by this Court.

## II

Review by this Court is also waranted because the Fifth Circuit's decision conflicts with decisions of other courts of appeals which, relying on *Pickering*, hold that a public employee's statements to his superiors are protected by the First Amendment unless, on the facts of the case, "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the First Amendment interest of the employee. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

The D.C. Circuit has recognized that First Amendment interests are at stake when public employees address communications to superior officials. In *Ring* v. *Schlesinger*, 502 F.2d 479 (D.C. Cir. 1974), a teacher employed at a naval facility sent a memorandum and a personal statement to four persons officially responsible for matters at the school. *Id.* at 481, 489. The memorandum charged that the principal was incompetent and had disregarded professional ethics. The court of appeals analyzed the constitutionality of the teacher's discharge in accordance



with *Pickering* and remanded for further proceedings because the district court had accepted uncritically the conclusion of the commanding officer that the memorandum had impaired the efficiency of the service. The circuit court concluded that "[t]he balancing here of First Amendment freedoms against an asserted governmental interest requires the judgment of the District Court." *Id.* at 489-90.

The Third Circuit in *Roseman* v. *Indiana University of Pennsylvania*, 520 F.2d 1364 (3d Cir. 1975), recognized that First Amendment interests were implicated by a professor's "private" complaints to her dean. Applying *Pickering*, the court determined that because the statements were neither made in a public forum nor involved matters of public concern, the First Amendment interest in their protection was "correspondingly reduced." The court stated, however, that "entirely different considerations would come into play" if the statements "had been on issues of public interest." *Id.* at 1368 n. 11.

The Fourth Circuit is in accord. In *Jannetta* v. *Cole*, 493 F.2d 1334 (4th Cir. 1974), Jannetta, a fireman, served on the City Manager a petition signed by 24 firemen protesting the promotion of black employees. For this, Jannetta was suspended and then terminated. The Fourth Circuit rejected the public employer's contention that in order to be protected by the First Amendment, a public employee's communication must be "directed to the public." *Id.* at 1337 n. 4.[10]

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[10] In *Jannetta*, the court recognized that a public employee has a First Amendment right "to communicate a grievance to his superiors." *Jannetta* v. *Cole*, *supra*, 493 F.2d at 1337 n. 5. As this statement suggests, such a communication implicates not only the "speech" but also the "petition" clause of the First Amendment. Even before *Pickering*, the Court of Claims had held that a federal employee's letter to the head of his department protesting and criti-

The Tenth Circuit, sitting en banc in *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973), acknowledged that the teacher dismissal case before it differed from *Pickering* in that Professor Smith's statements "were not made to the public as in *Pickering* but were made at meetings at which only Dixie College administrators and faculty were present." *Id.* at 338. The court of appeals concluded nonetheless that Professor Smith's statements were protected by the First Amendment. *Id.* at 340. See also *Hostrop* v. *Board of Junior College District No. 515, Ill.*, 471 F.2d 488, 493 n. 13 (7th Cir. 1972).[11]

In short, the decision below presents not only an important issue of constitutional law but conflicts with rulings of other courts of appeals that communications by public employees to their superiors implicate First Amendment interests.

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cizing the conduct of the employee's superiors was protected by the First Amendment freedom to petition for redress of grievances. *Swaaley* v. *United States*, 376 F.2d 857, 863 (Ct. Cl. 1967). See also *Burkett* v. *United States*, 402 F.2d 1002, 1003-04, 1007-08 (Ct. Cl. 1968); *Jackson* v. *United States*, 428 F.2d 844, 846, 848 (Ct. Cl. 1970).

[11] For district court opinions that reject the Fifth Circuit's rule, see *Johnson* v. *Butler*, 433 F. Supp. 531, 535 (W.D. Va. 1977) (First Amendment "not restricted to public statements" but extends "to protect private conversations by public employees"); *Phillips* v. *Puryear*, 403 F. Supp. 80, 87-88 (W.D. Va. 1975) (statements made to the department chairman and telephone conversations with hostile colleague are protected); *Downs* v. *Conway School District*, 328 F. Supp. 338, 346 (E.D. Ark. 1971) (teacher's private complaint to the principal that open incinerator near classroom constitutes health and safety hazard for children is protected).



## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted and the judgment of that court reviewed on the merits.

Respectfully submitted,

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# Appendices

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-3485

HENRY B. AYERS et al.,
*Plaintiffs,*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
*Defendants-Appellants,*

v.

MS. BESSIE B. GIVHAN, et al.,
*Plaintiffs-Intervenors Appellees.*

July 18, 1977

Before GEWIN, RONEY and HILL, Circuit Judges.

GEWIN, Circuit Judge.

Mary Butler, Bessie Givhan, and Dolleye Hodges filed suit in district court on their own behalf and on behalf of three classes of black teachers and employees who were discharged or not rehired by the Board of Education of the Western Line Consolidated School District ("school district"), allegedly in violation of the First and Fourteenth Amendments and in violation of the district court order issued pursuant to *Singleton* v. *Jackson Municiple Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc), *rev'd and remanded sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970), *on remand*, 5 Cir., 425 F.2d 1211. The district court dismissed the action without prejudice and granted leave to intervene in

the instant school desegregation case. After the court granted the defendants'[1] motion to strike the class allegations[2] and dismiss Ms. Butler's action with prejudice on her own motion, the case proceeded to a two-day bench trial. The court concluded that the school district failed to rehire Givhan because of her First Amendment expressions and failed to rehire Hodges in violation of the *Singleton* order, and it ordered their reinstatement. Defendants appeal under 28 U.S.C. § 1292(a)(1).[3] We reverse and remand.

The school district is a rural district encompassing most of Washington County and some of Issaquena County, Mississippi. Prior to desegregation proceedings in the district court it operated three black schools (O'Bannon, Avon, and Moore) and two white schools (Riverside and Glen Allan). Pursuant to *Singleton*, accelerated by *West Feliciana Parish School Board, supra*, the district court on January 12 and January 21, 1970, ordered the operation of the school district on a unitary basis after February 9, 1970.[4] Accordingly, the district

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[1] In addition to the school district itself, the school board members, the district superintendent, and principal James Leach were named as defendants.

[2] 61 F.R.D. 414, 416 (N.D.Miss.1973).

[3] The court also ordered the parties to confer about appellees' claims for back pay and attorneys' fees. After staying its reinstatement order pending appeal, the court entered a final judgment fixing the amount of back pay and attorneys' fees. 404 F.Supp. 1225 (N.D. Miss.1975).

[4] Those orders included, *inter alia*, the following *Singleton* provisions:

(a) Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of



was reconstituted into one high school and two elementary schools for the second semester of the 1969-70 school year. In the summer of 1970 the desegregation plan was amended to establish attendance centers with grades 1-12 at O'Bannon, Riverside, and Glen Allan. Blacks constituted a majority of the faculty and student body in the district both before and after desegregation. It is undisputed that the school district failed to develop nonracial objective criteria to be used in selecting staff members for dismissal or demotion, as required by the district court's *Singleton* order in note 4 *supra*.

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other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

(b) Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

(c) If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion or [sic] any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable nondiscriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

Appellee Givhan taught English in the junior high grades at O'Bannon from 1963 until her transfer to Riverside for the second semester of 1969-70. She then taught junior high English at Glen Allan during the 1970-71 school year. Appellee Hodges taught fifth grade for nearly four years at Glen Allan until January, 1970. At that time she became certified as a guidance counselor under an "eighteen hour permit," and thereafter she held the position of guidance counselor at Glen Allan. Having received her Master of Education degree in the spring of 1971, Hodges held a "double A" certificate as a guidance counselor during the 1971-72 school year. Beyond these facts, the cases of Givhan and Hodges are best treated separately.

I. Givhan

Givhan was not rehired by the school district for the 1971-72 school year.[5] By letter dated May 1, 1971, Glen Allan principal James Leach notified Superintendent C. L. Morris that Ms. Givhan was not being recommended for re-employment, stating in part:

> Ms. Givhan is a competent teacher, however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students.[6]

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[5] The teacher who replaced Givhan was black.

[6] Superintendent Morris gave his reasons for not rehiring Givhan in a letter to her dated July 23, 1971:

> (1) a flat refusal to administer standardized National tests to the pupils in your charge; (2) an announced intention not to cooperate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year.



Leach testified at trial as to the bases for his recommendation. Leach taught in the district for three years before becoming principal of Glen Allan on October 6, 1970. That school was without a principal for the first several weeks of the 1970-71 school year, and when Leach took the position the school's problems included racial hostility, lack of discipline among the students, and lack of cooperation among the teachers. Shortly after his arrival as principal, Leach solicited greater cooperation at a teachers' meeting. Givhan implied at the meeting that she did not intend to cooperate very much, and Leach later held a private conference with her. Leach testified that at the conference Givhan told him that "she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system." Givhan denied making these statements.

Leach and Givhan had several other encounters during the 1970-71 school year. Leach sent out a memorandum to all teachers reminding them of "six-weeks' tests" to be given on the Thursday and Friday before report cards were to be issued on the following Wednesday. Givhan apparently thought the memorandum was insufficient advance warning; while students were changing classes she discussed (or perhaps argued) with Leach about the inadequate notice and whether she was to give a "pop test." Leach interpreted this challenge to him in front of students as reflecting her antagonism. Givhan in effect admitted the incident, but explained that her concern for timely notice was generated by the memorandum's subject relating to the more comprehensive semester, not six-weeks', tests.

Another incident involved administration of a standardized achievement test. According to Leach, Givhan announced at a faculty meeting that she would not give the test, as she thought it was part of Ms. Hodges' job.

Leach was later twice informed by Hodges that Givhan still refused to give the test, and he testified that Hodges administered the test. Givhan testified that she may have expressed an intent not to give the test and that she told Leach it was a duty of the guidance counselor. She further testified that on the morning of the test she told Leach she would administer it and that she in fact did so. The latter testimony was corroborated by Hodges and Arcell Jacobs, another Glen Allan teacher at the time.

Finally, there was substantial testimony about "demands" made upon Leach by Givhan.[7] Relatively early in Leach's tenure as principal Givhan gave him a list or lists of what he termed "demands" and she termed "requests." These requests all reflect Givhan's concern as to the impressions on black students of the respective roles of whites and blacks in the school environment. She "requested," among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered "choice"; (2) that the administrative staff be better integrated;[8] and (3) that black Neighborhood

[7] Appellants also sought to establish these other bases for the decision not to rehire: (1) that Givhan "downgraded" the papers of white students; (2) that she was one of a number of teachers who walked out of a meeting about desegregation in the fall of 1969 and attempted to disrupt it by blowing automobile horns outside the gymnasium; (3) that the school district had received a threat by Givhan and other teachers not to return to work when schools reopened on a unitary basis in February, 1970; and (4) that Givhan had protected a student during a weapons shakedown at Riverside in March, 1970, by concealing a student's knife until completion of a search. The evidence on the first three of these points was inconclusive and the district judge did not clearly err in rejecting or ignoring it. Givhan admitted the fourth incident, but the district judge properly rejected that as a justification for her not being rehired, as there was no evidence that Leach relied on it in making his recommendation.

[8] Apparently all of the Glen Allan administrative and office personnel were white except for Ms. Hodges, the guidance counselor, Givhan's husband, who became assistant principal around Thanksgiving, 1970, and a Mr. Jackson. Ms. Givhan did not consider the roles of Hodges, Mr. Givhan, and Mr. Jackson very significant in the overall context of Glen Allan's administration. It should be noted that Mr. Givhan was rehired as assistant principal after Leach's recommendation not to rehire Ms. Givhan.



Youth Corps ("NYC") workers be assigned semi-clerical office tasks instead of only janitorial-type work.

Leach felt that these requests were unreasonable and that they therefore manifested, along with the other incidents noted above, Givhan's antagonistic and hostile attitude toward the administration at Glen Allan and the District. According to Leach, the lunchroom ticket-takers were assigned by the district's overall cafeteria supervisor (a white) at the request of the Glen Allan lunchroom manager (a black). Thus, Leach apparently thought that the assignment of lunchroom personnel was not within his power.[9] Givhan's NYC complaint arose from her concern about the impression on black children of a virtually all-white office staff and discrimination she sensed in the assignment of NYC workers. As she explained it, "when I was at Riverside, when we had white NYC workers and black, and whites worked in the office and the blacks washed the windows . . . I was pointing out to Mr. Leach the discrepancies there in the duties." Leach testified that he was ignorant about assignment of NYC workers at other schools, but thought Givhan's request unreasonable because there was no discrimination in his assignments, as the Glen Allan NYC workers were all black, and because NYC workers there were not qualified to do office work and in fact were hired to do janitorial work.

In sum, Leach testified that he recommended not rehiring Givhan because of her "arrogance and antagonistic and hostile relationship," manifested in the incidents described above, particularly her "unreasonable demands."

[9] Givhan's complaint apparently was triggered by the replacement of two black teachers' aides with a white student as ticket-taker. Givhan admitted that the lunchroom manager was black, but was unaware who had authority to assign lunchroom personnel.

Under Mississippi law in effect when the decision was made not to rehire Givhan, teachers had no tenure and teachers had no right to be tendered another contract. Miss.Code Ann. § 37-9-17 (1972); *Henry* v. *Coahoma County Board of Education*, 246 F.Supp. 517, 521 (N.D. Miss.1963), *aff'd*, 353 F.2d 648, 650 (5th Cir. 1965), *cert. denied*, 384 U.S. 962, 86 S.Ct. 1586, 16 L.Ed.2d 674 (1966). Accordingly, as stated by Judge Roney in *Megill* v. *Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976), the school district was entitled not to rehire Givhan for any reason, as long as the decision did not implicate a constitutional right. *Thompson* v. *Madison County Board of Education*, 476 F.2d 676, 679 (5th Cir. 1973). Further, because Givhan had no property interest in continued employment into the 1971-72 school year, she had no due process right to a hearing.[10] *Robinson* v. *Jefferson County Board of Education*, 485 F.2d 1381-82 (5th Cir. 1973), *cert. denied*, 419 U.S. 862, 95 S.Ct. 115, 42 L.Ed.2d 97 (1974).

As a consequence, appellee does not assert a procedural due process claim, but rather claims of discriminatory treatment, violation of the court's *Singleton* order, and violation of her right to freedom of speech. The district court ignored the first ground and avoided the second. This avoidance was due to "the court's disinclination to allow its decision on the merits to turn upon the tenuous distinction between the modest expansion of Western Line's teacher staff as defendants maintain was the case, or the very slight reduction for which plaintiffs argue." The district court's principal finding as to Givhan is as follows:

> [T]he primary reason for the school district's failure to renew Givhan's contract was her criticism of the

[10] There was testimony, however, that the District Board of Education ordinarily granted requests for a hearing by teachers not rehired. Givhan made no such request, and no hearing was held.



> policies and practices of the school district, especially the school to which she was assigned to teach. In Leach's words, Givhan was not rehired because she was constantly "making petty and unreasonable demands." The court finds that Givhan's "demands" were not constant; Leach being able to testify specifically as to but two occasions. The court finds that those of Givhan's "demands" as were specifically brought to the court's attention were neither "petty" nor "unreasonable", insomuch as all the complaints in question involved employment policies and practices at Glen Allan school which Givhan conceived to be racially discriminatory in purpose or effect.
>
> . . . [T]he school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination. The court conceives this to be a violation of Givhan's rights under the First Amendment to the Constitution of the United States. *Perry* v. *Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968).

The proper framework for our analysis was established by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). According to *Doyle*, a plaintiff in a case such as this has the initial burden to show (1) that his conduct was constitutionally protected, and (2) that this conduct was a "substantial factor" or a "motivating factor" in the school board's decision. *Id.* at 287, 97 S.Ct. at 576, 50 L.Ed.2d at 484. If the plaintiff meets that burden, the board can avoid liability only through proof by a preponderance of the evidence that it would have reached the same decision without regard to the protected

conduct. *Id.* Although not made in terms of *Doyle*, appellants' argument seems to touch all three bases. Thus, they argue that Givhan's expressions were not constitutionally protected, that her expressions were not a motivating factor in the school board's or Leach's decision, and that the school district had ample reason not to rehire her anyway.

As to the district court's findings of fact which conform to the *Doyle* framework, this court cannot reject them unless they are clearly erroneous. Federal Rule of Civil Procedure 52(a). As to legal conclusions reached by the district court, we are not bound by the "clearly erroneous" rule and we can make independent determinations. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268, 275 (1961). Often this distinction is termed one of questions of fact versus questions of law or versus mixed questions of law and fact. *See generally* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2588 (1971). This court sometimes has termed the distinction one between questions of subsidiary fact and questions of ultimate fact, best described by Judge Bell in *Causey* v. *Ford Motor Company*, 516 F.2d 416, 420-21 (5th Cir. 1975).[11]

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[11] There exists, however, a significant distinction for the purpose of applying the clearly erroneous test between findings of subsidiary fact and findings of ultimate fact. *See Galena Oaks Corp.* v. *Scofield*, 5 Cir. 1954, 218 F.2d 217, 219-20. Finding a subsidiary fact involves the determination of an evidentiary or primary fact; finding an ultimate fact, on the other hand, "may involve the very basis on which judgment of fallible evidence is to be made." *Baumgartner* v. *United States*, 1944, 322 U.S. 665, 671, 64 S.Ct. 1240, 1244, 88 L.Ed. 1525, 1529. Thus, for example, a finding of infringement of a patent is a finding of ultimate fact [citation omitted]; as is a finding that a gain should be treated as capital rather than ordinary for income tax purposes [citation omitted]. With respect to ultimate findings of fact, furthermore, we noted in *Industrial Instrument Corp.* v. *Foxboro Co.* [5 Cir.], *supra*, 307 F.2d [783] at 786 n. 2:

> We may reverse free of the clearly erroneous rule where . . . the issue revolves around an ultimate fact as distinguished from subsidiary fact questions . . . .
>
> * * * *
>
> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case . . . . As such, a finding of discrimination is a finding of ultimate fact.

*See also Wade* v. *Mississippi Cooperative Extention Service*, 528 F.2d 508, 516 (5th Cir. 1976) (racial discrimination); *Stepp* v. *Estelle*, 524 F.2d 447, 453 (5th Cir. 1975) (intelligent waiver of counsel); *East* v. *Romine, Incorporated*, 518 F.2d 332, 338-39 (5th Cir. 1975) (sex discrimination).



Applying this distinction to *Doyle*, the second and third elements—whether the teacher's conduct or expression was a motivating factor in the Board's decision and whether the Board would have reached the same decision anyway—are primarily questions of subsidiary fact to which the clearly erroneous rule applies. It is hard to conceive of issues that usually involve more credibility and other evaluative choices than what motivated someone and what the person would have done absent that motivation. The district court found that Leach and the Board were motivated primarily by Givhan's "demands" in deciding not to rehire her. That finding is not clearly erroneous. The court did not make an express finding as to whether the same decision would have been made, but on this record the appellants do not, and seriously cannot, argue that the same decision would have been made without regard to the "demands." Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. In support of this argument appellants rely, *inter alia*, on several incidents from the 1969-70 school year. See n. 7 *supra*. There is no evidence that Leach or the Board relied on these incidents or were concerned about them in 1971. Reliance on these incidents becomes

even more attenuated when it is noted that Givhan's principal at Riverside and the Board were aware of them yet rehired her for the 1970-71 school year. Therefore appellants failed to make a successful "same decision anyway" defense.

The first element of the *Doyle* standard, whether the plaintiff has proved that her conduct was constitutionally protected, is an "ultimate fact" based on subsidiary facts such as who communicated what to whom, when, and in what manner. The district court's findings of these subsidiary facts are not clearly erroneous. Although the testimony is conflicting as to what authority Givhan and Leach each thought Leach had with regard to cafeteria personnel and NYC workers, there is no dispute that she gave him a list of "demands," "requests," or complaints, among which were the references to these two subjects.[12] The question, then, is whether those expressions were constitutionally protected. That is a question of ultimate fact, which we can determine independently. *E. g., Causey, supra.*

Not all expression by a government employee is constitutionally protected. The determination of constitutional protection entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as employer, in promoting the efficiency of the public services it performs through its employees." *Doyle, supra* at 284, 97 S.Ct. at 574, 50 L.Ed.2d at 481-82; *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731,

[12] There is some evidence that Givhan subsequently orally reminded Leach of her complaints in private conversation. This reminder and the list constituted the "unreasonable demands" which the court found primarily motivated Leach in his recommendation. This finding seems somewhat inconsistent with the court's characterization of Givhan as a "vocal critic of the district's policies and practices." Perhaps "active" would be a more appropriate adjective than "vocal."



1734, 20 L.Ed.2d 811, 817 (1968). We often have been called upon to strike that balance.[13]

But before doing so we must determine whether on the facts of this case the teacher had a First Amendment interest *as a citizen* in making complaints to the principal. We have been cited to and have found no cases precisely in point. Here, in effect, a public employee privately voiced complaints and expressed opinions to her immediate superior. There is no allegation or evidence that the decision not to rehire her was due to information communicated in these expressions as to her religion, her associations with others, or her plans to bring her complaints and opinions to public attention.[14] Indeed, the

[13] *See, e. g., Abbott* v. *Thetford*, 5 Cir., 534 F.2d 1101, (en banc), *rev'g and adopting dissenting opinion*, 529 F.2d 695 (5th Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1598, 51 L.Ed.2d 804 (1977), (interference of Chief Probation Officer's expression in the form of a lawsuit with his work relationship with agencies sued justified dismissal by Juvenile Court Judge); *Smith* v. *United States*, 502 F.2d 512, 516, 518-19 (5th Cir. 1974) (the possibility of effect on patients of symbolic speech in form of wearing a peace pin constituted substantial interference with duties of wearer as staff psychologist at a Veterans Administration hospital).

Appellants did not expressly defend on the ground that Givhan's expression substantially interfered with her work or with her relationship with Leach, and the district court made no express finding as to substantial interference. The district court's finding that Givhan's complaints were neither constant nor unreasonable might be taken as a finding that there was no substantial interference with her work. As to the finding of reasonableness, the testimony was conflicting, as noted above. There is no real dispute, however, as to whether the complaints were "constant." Although Leach referred to *lists* of demands, he could cite only Givhan's occasional complaints about NYC workers, integration of the office staff and administration, and cafeteria personnel. In view of our disposition of the case we need not reach the issue of substantial interference.

[14] The loyalty oath and other cases make clear that requirements for public employment or public office cannot infringe on First Amendment rights to freedom of religion, association, and speech. *See, e. g., United States* v. *Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (prohibition of defense employment due to membership in the Communist Party); *Whitehill* v. *Elkins*, 389

record does not indicate that Givhan ever made public complaints or suggestions through letters to newspapers or periodicals, letters or remarks to the school Board, remarks at public meetings, telephone calls to radio talk shows, distribution of pamphlets, or the like. Without authority precisely in point, we turn to general freedom of speech principles.

The free speech clause is designed "to remove governmental restraints from the arena of public discussion." *Cohen* v. *California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284, 293 (1971). It is a guarantee to individuals of their personal right "to make their thoughts public and put them before the community." *Curtis Publishing Company* v. *Butts*, 388 U.S. 130, 149, 87 S.Ct. 1975, 1988, 18 L.Ed.2d 1094, 1107 (1967). The result is a "marketplace of ideas," in which debate is "uninhibited, robust, and wide open." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759, 96 S.Ct. 1817, 1824, 48 L.Ed.2d 346, 357 (1976); *Bond* v. *Floyd*, 385 U.S. 116, 136, 87 S.Ct. 339, 349, 17 L.Ed.2d 235, 247 (1966). A school and the area around it can be a forum for public discussion. *Grayned* v. *City of Rockford*, 408 U.S. 104, 118, 92 S.Ct. 2294, 2304, 33 L.Ed.2d 222, 233 (1972); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731, 737 (1969).

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U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967) (overbroad loyalty oath deters advocacy and associations protected by the First Amendment); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (seditious utterances, advocacy of forceful overthrow of government, and membership in the Communist Party); *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966) (freedom of association deterred by overbroad loyalty oath); *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (same); *Torcaso* v. *Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (freedom of religion infringed by requirement that public officials declare belief in the existence of God).



Citizens would be deterred from contributing to this public marketplace of ideas if their opportunities for public employment or other public benefits might be adversely affected by their expressions. Consequently, public employment can be denied or terminated on account of the employee's constitutionally protected expression only when the interest of the state as employer and provider of services outweighs the First Amendment interest. *Pickering*, *supra*, 391 U.S. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817; *see* n. 13 *supra*. The three leading Supreme Court cases on teacher dismissals and freedom of speech illustrate the importance of protecting the right of public expression. In *Pickering* a teacher was dismissed for sending a letter to a local newspaper that was critical of the way in which the Board and superintendent had handled past proposals to raise new revenues for the schools. The Court, speaking through Justice Marshall, concluded that on the facts of *Pickering*

> the interest of the school administration in limiting teachers' opportunities contribute to *public debate* is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

391 U.S. at 573, 88 S.Ct. at 1737, 20 L.Ed.2d at 820 (emphasis added).

Likewise, in *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), a teacher alleged, *inter alia*, that he was not rehired in retaliation for his public criticism of the college's Board of Regents. This public criticism appeared in the form of a newspaper advertisement over Sindermann's name and his testimony before committees of the Texas legislature. The district court granted summary judgment, on virtually the pleadings alone, for the defendants, and this court reversed. 430 F.2d 939 (5th Cir. 1970). The Supreme Court affirmed, saying in part:

> The respondent has alleged that his non-retention was based on his testimony before legislative committees and his other *public statements* critical of the Regents' policies. And he has alleged that this *public criticism* was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's *public criticism* of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment.

*Id.* at 598, 92 S.Ct. at 2698, 33 L.Ed.2d at 578 (emphasis added).

*Doyle* completes the trilogy. The crucial incident giving rise to Doyle's First Amendment claim was a telephone call he made to a disc jockey at a local radio station conveying the substance of a memorandum relating to teacher dress and appearance circulated by a school principal. The Court accepted the district court's conclusion that this communication was protected by the First Amendment because the Board's "reaction to his communications to the radio station was [nothing] more than an ad hoc response to Doyle's action in making the memorandum *public*." 429 U.S. at 284, 97 S.Ct. at 574, 50 L.Ed.2d at 482 (emphasis added).

The strong implication of these cases is that private expression by a public employee is not constitutionally protected.[15] Recent cases add support to this dichotomy.

[15] This implication also can be found in our teacher dismissal and freedom of speech cases. *See, e. g., Megill* v. *Board of Regents, supra* (context of remarks justified Board action; remarks, however, were clearly public, and included expressions in a press conference, in a newspaper interview, in a panel discussion attended by 50 people, at a public meeting on campus, and at a meeting of the Board); *Kaprelian* v. *Texas Woman's Univ.*, 509 F.2d 133, 139 (5th Cir. 1975) (teacher protected in voicing and applying in his teaching



This Term the Court has held that a state may not, through its public employment relations scheme, restrict the right of teachers to express themselves at a school board meeting open to the public. *City of Madison, Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). The state commission found the school district guilty of engaging in negotiations with a member of a bargaining unit other than the exclusive representative by allowing a teacher to speak on an issue related to contract negotiations at a public Board meeting. The Court held this decision to violate the First Amendment:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in *public discussion* of public business cannot be confined to one category of interested individuals.

*Id.* at 175, 97 S.Ct. at 426, 50 L.Ed.2d at 385. (Emphasis added). In his concurrence, in which Justice Marshall joined, Justice Brennan expressed the view that "the

academic views relevant to assignments); *Lewis* v. *Spencer*, 490 F.2d 93 (5th Cir. 1974), *aff'g*, 369 F.Supp. 1219 (S.D.Tex.1973) (appearance before state legislature and participation in organizing a local chapter of a teachers' association are protected); *Duke* v. *North Texas State Univ.*, 469 F.2d 829, 832 (5th Cir. 1972), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2760, 37 L.Ed.2d 160 (1973) (teacher protected in her remarks to students and prospective students at a meeting in a campus park); *Moore* v. *Winfield City Bd. of Educ.*, 452 F.2d 726, 727 (5th Cir. 1971) (Board action not motivated by teacher's expressions, which included criticism of school administration in speech at a local Classroom Teachers Association dinner); *Pred* v. *Board of Pub. Instruction*, 415 F.2d 851, 853-54 (5th Cir. 1969) (participation in an organization and advocacy in classroom instruction of "demands" for campus freedom protected). *See also Abbott* v. *Thetford, supra* (substantial interference of expression with job justified dismissal; expression in the form of a lawsuit); *Smith* v. *United States, supra*, at 516 (substantial interference of expression with job justified dismissal; expression made by wearing of a peace pin).

First Amendment plainly does not forbid Wisconsin from limiting attendance" at a private bargaining session "and denying [teachers] the right to attend and speak at the session." 429 U.S. at 178, 97 S.Ct. at 428, 50 L.Ed.2d at 386. But, he continued:

> . . . [T]he First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation. [footnote omitted]. In such case, the state body has created a *public forum* dedicated to the expression of views by the general public. . . . The State could no more prevent [the teacher] from speaking at this *public forum* than it could prevent him from publishing the same views in a newspaper or proclaiming them from a soapbox.

*Id.* at 178, 97 S.Ct. at 428, 50 L.Ed.2d at 387. (Emphasis added).

Finally, it should be noted that no one has a right to press even "good" ideas on an unwilling recipient. *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736, 743 (1970) (to hold unconstitutional a statute authorizing addressee to stop mailings of pandering advertisements to him "would hardly make more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication"). *See also Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 305, 307, 94 S.Ct. 2714, 2719, 41 L.Ed.2d 770, 778, 779 (1974) (Douglas, J., concurring) ("While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it.").[16]

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[16] *Rowan* is arguably distinguishable because of the citizen's compelling interest in privacy within his or her own residence. *E. g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1, 6 (1971). The rationale of *Rowan*, however, is not limited to the home. It applies whenever "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 & n. 5, 95 S.Ct. 2268, 2272 & n. 5, 45 L.Ed.2d 124, 131 & n. 5 (1975) (Powell, J.). While an intrusion on privacy in the home may be of greater significance than an intrusion on privacy in the workplace, one's "degree of captivity" in the workplace may be much greater. In the normal course of his job, principal Leach could hardly avoid exposure to teacher Givhan and her demands, requests, and complaints. Indeed, as a practical matter Leach was a very captive audience for Givhan as long as they both worked in the same school.



These general principles lead us to conclude that teacher Givhan did not engage in constitutionally protected speech in her expressions to principal Leach. Neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision. There is no evidence here that Givhan sought to disseminate her views publicly, to anyone willing to listen.[17] Rather, she brought her complaints to Leach alone. Neither is there evidence that the Board or Mississippi law delegated to Leach the task of entertaining complaints from all comers and that he discriminated in choosing to reject her complaints and not to rehire her because she impressed him into such service.

It is often said that hard cases make bad law.[18] This could be such a case. Many, if not most people would consider Givhan's expressions laudable. Protection of the

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[17] Leach testified that he sent her lists of demands to the school superintendent. Apparently they were ignored. That does not alter the fact that Givhan chose Leach as the only recipient of her expressions.

[18] *E. g., In re Southwestern Bell Telephone Co.*, 542 F.2d 297, 298 (5th Cir. 1976) (en banc) (Hill, J., dissenting), *rev'd*, —— U.S. ——, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977).

First Amendment, however, does not turn on the social worth of ideas. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212, 217 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542, 549 (1969); *Terminiello* v. *Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131, 1134 (1949). If we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions. Perhaps it would be wise in terms of education and public employment to encourage anyone interested in public education to express their views and complaints to school principals. That policy, however, is a matter for Mississippi educators, school boards, state courts, and legislative bodies, for in the absence of constitutionally protected rights, federal courts are loathe to intrude into internal school affairs. *Bishop* v. *Wood*, 426 U.S. 341, 347-350, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684, 691-693 (1976); *Megill* v. *Board of Regents*, *supra*, at 1077; *Blunt* v. *Marion County School Board*, 515 F.2d 951, 956 (5th Cir. 1975).

Since Givhan has not prevailed on her First Amendment claim, her case is reversed and remanded for further district court proceedings, including determination of her *Singleton* claim.[19]

## II. Hodges

As noted earlier, appellee Hodges served as guidance counselor at Glen Allan during the second semester of the 1969-70 school year and during the 1970-71 and 1971-72 school years. During the second semester of 1970 and the 1970-71 school year Hodges was one of three

[19] If on remand appellee succeeds on her *Singleton* claim, it will be for the district court in the first instance to determine the propriety of reinstatement as a remedy in accordance with our discussion of reinstatement as to *Hodges*, *infra*.



guidance counselors employed by the school district. Each was assigned to one of the district's three integrated schools. Ora Kelly (black), the counselor at O'Bannon, was reassigned as an elementary teacher for the 1971-72 school year because she did not qualify for license renewal. James Pollard (white), with the title of the school district's "head counselor" and the counselor assigned to Riverside, resigned at the end of the 1970-71 school year. Neither Pollard nor Kelly was replaced for the 1971-72 school year, leaving Hodges at Glen Allan as the school district's only guidance counselor.

District Superintendent Morris in March or April, 1972, decided to abandon the concept of a counselor for each school and instead to hire one counselor for the whole district for 1972-73. Tony Cintgran, a white, eventually was hired for this position. Around March 8, 1972, Hodges learned that Leach was recommending that she not be rehired. Leach and Harold Adams, assistant superintendent, told her that the reasons for the decision included parental opposition and her inability to get along with students.

In September, 1972, Hodges was informed of a vacancy in the district and applied to Superintendent Morris for the position. He refused her application, citing (1) her refusal to accept a fourth grade position for 1971-72 and (2) the "letter [Hodges] sent to Atlanta."

The latter reference was to Hodges' application to Atlanta University in the spring of 1972. The application had to be accompanied by the written recommendations of the principal and assistant principal. Hodges was not sure how long she had had the necessary forms for the recommendation and rating, but it suddenly dawned on her on Thursday, April 6, that the application was due on Monday, April 10. Since she was leaving on Friday the 7th for a meeting in Jackson, she decided it was imperative that the application be completed promptly.

She looked for principal Leach but could not find him. She approached Assistant Principal Givhan, who without knowledge of exactly what she wanted, told her that he was busy and to "get someone else to sign it for you." Hodges did exactly that. She wrote a recommendation, displaying "a lively appreciation of her own worth and abilities," [20] signed Leach's name to it, filled out the rating blank, and got someone else to sign Ms. Givhan's name to it.

Although Hodges was quite contrite about this episode at trial,[21] district officials learned of it only inadvertently. After completing and signing the forms, Hodges got a girl in the library to type the address on the envelope. The envelope was addressed inadequately, and the letter was returned to Leach. Leach apparently sent the letter to Superintendent Morris, who put it in Hodges' file. When Morris brought up the incident at the time she applied for a position in September, 1972, Hodges had difficulty remembering it. Morris refreshed her memory by showing her the letter. She admitted writing it, and Morris rejected her application.

The district court again avoided deciding whether there was an overall reduction in faculty positions making the *Singleton* order applicable. Instead the court thought that the counselor positions themselves were an appropriate group upon which to determine applicability of *Singleton*. It then concluded that there had occurred a reduction from three to one counselor positions between the 1971-72

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[20] *Kaprelian* v. *Texas Woman's Univ., supra,* at 135 (Gee, J.).

[21] She testified that when she wrote and signed the recommendation she had little time and was otherwise "under pressure." She explained that she had signed other documents for Leach before, at his request, but she admitted that he did not authorize her to complete and sign in his name her own recommendation. It is also well established that when she had difficulty "finding" Leach for his recommendation she knew he had recommended that she not be rehired for the next school year.



and 1972-73 school years. The court acknowledged that Hodges had been the only counselor employed by the school district in 1971-72. However, the court observed that there had in fact been three counselor positions that year, with the district apparently either unable or unwilling to replace Kelly and Pollard. The court found that the district's scheme of employing counselors resulted in there being one instead of three positions in 1972-73, that *Singleton* therefore applied, and that since the school district did not apply "objective and reasonable non-discriminatory standards" in effecting the reduction, only "just cause" would excuse Hodges' nonretention. The court found no just cause. That finding is not clearly erroneous. Appellants contend that the court erred in applying *Singleton.*

We agree with the district court that the school district was still in the process of becoming a unitary system in 1972, that is, it was still in a *Singleton* situation. *See, e.g., United States* v. *Coffeeville Consolidated School District,* 513 F.2d 244, 247 (5th Cir. 1975); *United States* v. *Texas,* 509 F.2d 192, 193 (5th Cir. 1975). By its own terms, however, *Singleton* applies only "[i]f there is to be a reduction in the number of principals, teachers, teacher-aids, or other professional staff." Our recent cases establish that not only an arithmetic reduction is required, but a reduction related to desegregation. *Hardy* v. *Porter,* 546 F.2d 1165, 1167-68 (5th Cir. 1977) (former principal lost his *Singleton* protection when he left the system for "reasons unrelated to the desegregation process"); *Lee* v. *Chambers County Board of Education,* 533 F.2d 132, 135 (5th Cir. 1976); *Pickens* v. *Okolona Municipal Separate School District,* 527 F.2d 358, 361, 362 & n. 3 (5th Cir. 1976). As we said in *Lee, supra*:

> *Singleton* was designed to ensure that the transition from a dual to a unitary system, with all the concomitant logistical problems, would not occur in an un-

> fair treatment of black teachers and staff members. Oliver's demotion from the position of Assistant Attendance Supervisor to that of classroom teacher was not a result of the desegregation of Chambers County schools, but rather was necessitated by termination of the Title I funds that paid his salary.

A plaintiff seeking *Singleton* protection has the burden of proving the applicability of its terms. *Cf. Hardy* v. *Porter, supra; Lee* v. *Chambers County Board of Education, supra.* There is no evidence in this record that the reduction in counselor positions was related to desegregation, and the court made no such finding. Since the "desegregation-relatedness" aspect of *Singleton* may not have been entirely clear when the case was tried, it is appropriate to reverse and remand for further consideration of why the district changed its counselor employment scheme. If that change was not related to desegregation, *Singleton* would not apply to Hodges regardless of any reduction in the overall faculty related to desegregation, because elimination of *her* position would not have been so related. *Hardy* v. *Porter, supra.*

If the district court finds that Hodges was protected by *Singleton*, reinstatement in this case would be an inappropriate remedy for its violation. Reinstatement is a usual remedy for *Singleton* violations. *See, e.g., McLaurin* v. *Columbia Municipal Separate School District*, 530 F.2d 661, 665-66 (5th Cir. 1976); *Ward* v. *Kelly*, 515 F.2d 908, 912 (5th Cir. 1975); *Cornist* v. *Richland Parish School Board*, 495 F.2d 189, 191 (5th Cir. 1974). As Judge Godbold noted in *Hardy* v. *Porter, supra*, at 1168, the requirements of *Singleton* are equitable remedies designed to fashion relief for constitutional violations "in accordance with principles of fairness." Consequently, our reinstatement cases have been predicated on the plaintiffs' qualifications as school teachers and administrators. *E.g., Kelly* v. *West Baton Rouge Parish School Board*, 517 F.2d 194, 199 (5th Cir. 1975).



Also with a view toward equity, "just cause" is a good defense to school district action in violation of *Singleton. Thompson* v. *Madison County Board of Education*, 476 F.2d 676, 678-79 (5th Cir. 1973). As we said there,

> "Just cause" in a *Singleton* situation means types of conduct that are repulsive to the minimum standards of decency—such as honesty and integrity—required by virtually all employers of their employees, and especially required of public servants such as school teachers. . . For example, if a teacher came to school drunk, or was found stealing from the school treasury, or sexually assaulted a student . . . .

Although such conduct sometimes may not negate an employer's violation of an employee's rights, for example, because it was not relied upon by the employer in making a decision to discharge or not to rehire, it may preclude reinstatement as a remedy.[22] That is the case here. There is no evidence that Leach or the Board

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[22] *E.g., Moore* v. *School Board*, 364 F.Supp. 355, 361 (N.D.Fla. 1973) (reinstatement inappropriate where teacher had abused authority by relating to students his personal experiences with prostitutes and other illegitimate topics). *See also Florida Steel Corp.* v. *NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (employee raised fist and cursed supervisor); *Trailmobile Division, Pullman Incorporated* v. *NLRB*, 407 F.2d 1006, 1018 (5th Cir. 1969) (reinstatement denied to striking employees who intimidated and assaulted nonstriking employee); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77, 83 (5th Cir. 1966) (reinstatement denied to employees who pilfered company property); *NLRB* v. *Bin-Dicator Company*, 356 F.2d 210, 215-16 (6th Cir. 1966) (reinstatement denied to employee who made "fearsome threats and gestures" to supervisors); *NLRB* v. *R.C. Can Company*, 340 F.2d 433, 435-36 (5th Cir. 1965) (reinstatement denied to employee who threatened to harm the plant manager); *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (employee disqualified from reemployment by "his pattern of falsification and deceit during his employment"); *NLRB* v. *National Furniture Mfg. Co.*, 315 F.2d 280, 286 (7th Cir. 1963) (reinstatement denied because of "basic antagonism" between employee and employer).

relied on the incident relating to the unauthorized signatures in deciding not to rehire Hodges. After they learned of the incident, however, they rejected her application for a different position in September, 1972. Hodges wrote her own recommendation, signed Leach's name to it, and procured another teacher to sign Mr. Givhan's name on the rating blank, all with knowledge that these actions were not authorized and that the university would rely on the authenticity of the signatures. Such conduct was a type "repulsive to the minimum standards of decency . . . required by virtually all employers of their employees." *Thompson* v. *Madison County Board of Education, supra.* Her conduct particularly disqualified Hodges for the sensitive position of guidance counselor to young students.

Accordingly, we reverse and remand Hodges' case for further district court consideration of her *Singleton* claim. We leave to the district court the determination of Hodges' entitlement to attorneys' fees and to damages for the interim between the decision not to rehire her as a counselor and the decision not to consider her future employment because of her conduct in using unauthorized signatures on recommendations in her own behalf.

REVERSED and REMANDED.

RONEY, Circuit Judge, specially concurring:

I concur in the result reached by Judge Gewin in this case. I think that there are probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in the First Amendment terms.



## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 66-1-S

HENRY B. AYERS, et al.,
*Plaintiffs*

and

MS. BESSIE B. GIVHAN, et al.,
*Intervenors*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
*Defendants*

### MEMORANDUM OF DECISION

This action is before the court on the intervention complaint of Mrs. Bessie G. Givhan (Givhan) and Mrs. Dollye W. Hodges (Hodges) seeking reinstatement as teachers in the schools operated by defendant Board of Education of the Western Line Consolidated School District (Western Line), back pay, attorneys' fees, and other relief.

The action has been tried to the court and is now ripe for decision. The court's findings of fact and conclusions of law based upon the record in the action sub judice and evidence introduced at the hearing on the merits, are incorporated in this memorandum of decision.

The court entered an order herein on January 12, 1970, directing defendants to convert a segregated school system into a unitary one. The order contained standard *Singleton* provisions with regard to the dismissal

and promotion of faculty and staff personnel during the desegregation process.[1] On January 21, 1970, the court entered a supplemental order dividing the district into two geographical zones for the assignment of students in grades one through eight. All children in grades nine through twelve were assigned to one school.

The court entered an order with consent of all parties on June 29, 1970, dividing the district into three geographical zones. There are three schools situated in the district, O'Bannon, Glen Allan and Riverside. Students in all grades were assigned according to residence to one or the other of the schools.

Givhan was an English teacher at Glen Allan during the 1970-71 school year. She was not tendered a contract for the 1971-72 term, although she had been a teacher in the school district for eight years. Prior to her employment at Westren Line, she taught for four years in the schools of an adjacent county.

The contract for Hodges was not renewed for the 1972-73 school year. At the time the initial desegregation order was entered, she was employed as a guidance counselor at Glen Allan. This was the position she held when discharged.

The *Singleton* provisions include:

> 1. Effective not later than February 1, 1970, the principals, teachers, teacher-aides, and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year, the district shall assign the staff described above so that the ratio of Negro to white

[1] Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969).



> teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.
>
> The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.
>
> 2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.
>
> 3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.
>
> Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evalu-

ation shall be made available upon request to the dismissed or demoted employee. 419 F.2d at 1217-18.

The threshold question is: Can plaintiffs claim the protection of the *Singleton* provisions? Defendant school district did not develop or adopt a nonracial objective criteria to be used in selecting the staff members to be dismissed or demoted.

Western Line claims that the nonracial objective criteria is to be used only where a staff member is either dismissed or demoted during staff reduction occasioned by the conversion to a unitary system. Plaintiffs contend that use of the criteria is required for all dismissals and demotions occuring during the period of desegregation.

The decision not to extend Givhan's contract was made during the first full school year of the desegregation process. The decision that a new contract would not be tendered Hodges was made during the second school year of such process.

A study of the record reveals that the school district had not become unitary when plaintiffs' contracts were not renewed and they were dismissed from the staff. United States v. State of Texas, 509 F.2d 192 (5th Cir. 1975); Youngblood v. Board of Public Instruction, 448 F.2d 770 (5th Cir. 1971).

Defendants rely on a stipulation made at the trial to show that plaintiffs were not dismissed as result of a reduction in staff. They support their position with the argument that at the beginning of the 1970-71 term, the teaching staff of the district aggregated 109 teachers and that the staff was increased to 125 for the following year, that being the 1971-72 term. It was during the 1970-71 term that Mrs. Givhan's contract was not renewed. Defendants assert that there was not a reduction in staff between the 1971-72 and 1972-73 terms. Mrs. Hodges contract was not renewed during the 1971-72



term. The stipulation reflects that the staff for the 1972-73 term was raised to 129, an increase of 4 of the former year. The critical period involved in this issue, is the one beginning with the 1970-71 term and ending with the 1972-73 term. The record reflects that 32 teachers left the school at the end of the 1970-71 term and 27 teachers left the school at the end of the 1971-72 term. Those leaving the school district at the end of the 1970-71 school term included 6 who were not recommended for reemployment, of which Givhan was one. Those leaving the district at the end of the 1971-72 term were 6, of which Hodges was one. It is noted in the case of Hodges, that there was, however, a reduction in the staff of counselors.

Plaintiffs take issue on the figures reflected by the stipulation. Plaintiffs filed a post-trial motion seeking to be relieved of the stipulation. Counsel for plaintiffs assert that a teacher-by-teacher count of the annual reports filed by defendants in this action and the computer printouts furnished by defendants in answers to interrogatories served upon them reflect an accurate count. Plaintiffs have used the corrected figures in presenting their argument to the court on this issue.

Plaintiffs contend that the correct tabulation is as follows:

| For the School Year | Black Teachers | White Teachers | Total Teachers |
|---|---|---|---|
| 1970-71 | 84 | 47 | 132* |
| 1971-72 | 80 | 49 | 130* |
| 1972-73 | 74 | 54 | 129* |

Plaintiffs assert, therefore, that the correct figures show a reduction of staff during the pertinent period.

* Tabulations do not include one teacher at Glen Allan which was not characterized as either black or white.

Defendants object to the withdrawal of the stipulation, contending that if the stipulation had not been made, live testimony would have been offered at the trial to substantiate the figures and confirm the non-reduction of staff.

The court finds it unnecessary to resolve this controversy between the parties as to the expansion or reduction of the overall teaching staff in the Western Line Consolidated School District in the years in question. The need for resolving this issue concerning the stipulation is obviated by the court's disinclination to allow its decision on the merits to turn upon the tenuous distinction between the modest expansion of Western Line's teacher staff as defendants maintain was the case, or the very slight reduction for which plaintiffs argue. An examination of the statistics as to the overall teacher population in the defendant school district is unnecessary as to both plaintiffs. The court has concluded that Givhan is entitled to relief on First Amendment grounds entirely independent of *Singleton* and the defendant's failure to renew Hodges's employment contract contravened the *Singleton* provisions of the court's order previously entered in this case because the court interprets the record to indicate that there was in fact a drastic reduction of defendants' staff in Hodges's field of specialization, guidance counseling, in the year of Hodges's discharge.

Inasmuch as no hearing was held by the defendant school board on the issue of the non-renewal of plaintiffs' contracts, there are no findings of fact before the court now which may be reviewed under the substantial evidence rule of Thompson v. Madison County Board of Education, 476 F.2d 676, 678 (5th Cir. 1973). Consequently, the court was required to make its own inquiry as to the reasons for plaintiffs' non-renewal. United States v. Coffeeville Consolidated School District, 513 F.2d 244, 248 (5th Cir. 1975). The court's findings on the evidence presented at trial follow.



## Givhan

In a letter dated May 1, 1971 and addressed to the superintendent of the school district, Leach recommended that Givhan's employment contract not be renewed for the 1971-72 school year and went on to make the following statement:

> "Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude toward me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students."

In response to Givhan's inquiry as to why she was not rehired for the 1971-72 school years, the superintendent of the district stated, in a letter to Givhan dated July 23, 1971, that the reasons were (1) her "flat refusal to administer standardized national tests to the pupils in her charge," (2) her "announced intention not to cooperate with the administration of the Glen Allan Attendance Center," and (3) her "antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center throughout the school years."

At the trial, the rather generalized statements of Givhan's shortcomings contained in the May and July letters were particularized somewhat by testimony as to the specific incidents involving Givhan which served as the basis of the stated reasons for her discharge. Defendants offered evidence seeking to prove the following:

> (1) That Givhan made unreasonable demands upon the administration of the district, in the nature of complaints to her principal, including the following:

(a) That black Neighborhood Youth Corps workers were given more menial job assignments than similarly situated white workers; and

(b) That the lunchroom personnel were treated in a racially discriminatory manner by persons charged with management of the lunchroom.

(2) That on one occasion, Givhan failed to cooperate with the school administration in a weapons shakedown. The charge was that upon learning that a shakedown was to be held on the day in question, March 17, 1970, Givhan took a knife from a student in her classroom prior to the arrival of the personnel who were to perform the shakedown. Givhan allegedly returned the knife to the student prior to the end of the school day. Subsequently, another student was injured by the knife on the schoolgrounds through an "accidental fall."

(3) That Givhan intentionally graded the tests administered to white students in her classes lower than black students.

(4) That on one occasion, Givhan refused to administer an "achievement test" to the students in her classroom.

The court does not feel that the shakedown/knife incident served, or should have served, as a reason for the decision not to re-hire Givhan for the 1971-72 school year. The incident occurred prior to Leach's assumption of the principalship of the Glen Allan school in the Fall of 1970. The month following the incident, Givhan's then —principal recommended her for re-employment for the 1970-71 school year.

The testimony offered at trial concerning the charge that Givhan graded her students' papers in a racially discriminatory manner was insufficient and inconclusive.



There was a sharp conflict in the testimony concerning the charge that Givhan refused to administer a test to her students. Leach testified that he was required to secure the services of another teacher to administer the test, while Givhan testified that she did in fact give the test herself.

The court, as finder of fact, after hearing all the testimony and reviewing the exhibits introduced at the trial, has concluded that the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach. In Leach's words, Givhan was not re-hired because she was constantly "making petty and unreasonable demands." The court finds that Givhan's "demands" were not constant; Leach being able to testify specifically as to but two occasions. The court finds that those of Givhan's "demands" as were specifically brought to the court's attention were neither "petty" nor "unreasonable", insomuch as all the complaints in question involved employment policies and practices at Glen Allan school which Givhan conceived to be racially discriminatory in purpose or effect.

The court is aware of the considerable problems which occurred in this school district during the establishment of a unitary system in the 1969-70-71 period. There were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation of Western Line School District. Most happily, the passage of time has dissipated the great majority of this friction. However, when the school district's decision to terminate Givhan's employment is placed into a setting contemporaneous with its conception and execution, it becomes clear to the court that the school district's motivation in failing to renew Givhan's

contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination. The court conceives this to be a violation of Givhan's rights under the First Amendment to the Constitution of the United States. Perry v. Sindermann, 408 U.S. 593, 33 L. Ed.2d 570, 92 S. Ct. 2694 (1972); Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed.2d 811, 88 S. Ct. 1731 (1968).

*Hodges*

As stated previously, the court is of the opinion that Hodges is entitled to *Singleton* protection which is available whenever "there is to be a reduction in the number of principals, teachers, teacher-aides, *or other professional staff* employed by the school district which will result in a dismissal or demotion of any such staff members . . . ." Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1218 (5th Cir. 1970). [Emphasis added].

In 1969, at the time the initial desegregation of the defendant school district, there were three counselor slots authorized on the staff of the defendant district, one at each of the three schools in the district. During the 1969-70 and 1970-71 school years, all three of these authorized slots were filled by counselors actually employed by the defendants. During the 1971-72 school year, the counselors employed at two of the schools in the district left defendants' employ for reasons not apparent from the record. During that year (1971-72) Hodges was assigned to Glen Allan and was the only counselor employed by the district. Apparently the district was unwilling or unable to employ counselors at the other two schools within the district.

In 1972-73, the school district altered its counseling operation drastically. Instead of assigning one counselor at each of the three schools within the district, one



"super" counselor was hired to cover the entire district at a salary approximately forty-three percent greater than that received by the highest paid of the three counselors in previous years.

In 1972-73, therefore, the authorized slots for counselors in the defendant school district decreased from three to one. Hodges, a black, was terminated from defendants' employ in 1972-73. A white "super" counselor was hired in 1972-73.

Viewing the situation regarding counselors in the defendant school district as a whole, the court is convinced that a reduction in counselor staff in the contemplation of *Singleton* occurred in the defendant school district in 1972-73 even though the number of persons actually employed by the defendant as counselors that year remained constant.

The court considers "counselor" to be a gender of school employee analogous to principal, teacher, and teacher-aide and, therefore, a sub-group in the contemplation of *Singleton*. Insomuch as there was a reduction in the counselor staff in the year of Hodges's termination and the Western Line School District did not employ "objective and reasonable non-discriminatory standards" in effecting the reduction in question as required by the *Singleton* provisions, the school district's failure to renew Hodges's contract may be allowed to stand only if the court is convinced that Hodges's discharge was for "just cause."

In determining if the failure to rehire Hodges was occasioned by "just cause", the court is instructed by Thompson v. Madison County Board of Education, 476 F.2d 676 (5th Cir. 1973).

> "Just cause" in a *Singleton* situation means types of conduct that are repulsive to the minimum standards of decency—such as honesty and integrity—

> required by virtually all employers of their employees, and especially required of public servants such as school teachers. *Id.* at 679.

Turning to the reasons for the non-renewal of Hodges's contract, such as the court has been able to determine, it appears that the initial step leading to Hodges's disemployment was the decision of Hodges's principal, Leach, not to recommend Hodges for employment for the 1972-73 school year. Leach testified his decision was made in the spring of 1972. This testimony is verified by Defendants' Exhibit 12, which is a Teacher Evaluation form dated March 9, 1972 and upon which Leach, in fact, recommended that Hodges's contract not be renewed for the coming school year. On the Teacher Evaluation form, Leach gave his reason for his failure to recommend to be the following: "Mrs. Hodges does not have the proper relationships with pupils, parents, and co-workers which is necessary for a guidance counselor."

At the trial in this action, the only concrete example of the bases for his conclusion that Hodges lacked "proper relationships" which Leach could offer concerned one incident which occurred in Leach's office. Apparently Hodges was having difficulties of a personal nature which on the occasion in questions caused her to become emotionally upset to the point of tears. Regardless of whether this one incident would warrant the loss of any job in any conceivable situation, it impresses the court as falling pitifully short of the "just cause" necessary to uphold a dismissal in a *Singleton* situation such as we have here.

The only other specific incidents of questionable conduct concerning Hodges which the defendants were able to bring to the attention of the court involved a form which recommended Hodges for admission to graduate school. Hodges completed the form, signed the name of her principal, Leach, to it, and mailed it to the graduate



school. In her testimony, Hodges freely admitted signing Leach's name to the form but claimed that it was customary for her to sign his name to papers of this sort and she felt that he would have no objection to her actions in this regard. Further, she stated that Leach was unavailable and it was imperative that the form be mailed at once.

Defendants characterized Hodges's conduct regarding the graduate school recommendation as forgery and dishonesty in the extreme, such as that which amounts to "just cause" for dismissal even in a *Singleton* situation.

Whatever the implications of this conduct by Hodges, it clearly has no bearing of the issue of Hodges's failure to be rehired for the 1972-73 school year. The graduate school recommendation ostensibly signed by Leach was dated and postmarked April 6, 1972. The fact that Hodges had signed Leach's name to the form did not become known to defendants until the envelope containing the form was returned to the sender (as reflected in the return address, Glen Allan Attendance Center) because a sufficient address for the intended recipient was lacking. Leach's decision not to recommend Hodges for continued employment was made and documented in March of 1972. There is nothing in the record to show that the board's acceptance of Leach's unfavorable recommendation as to Hodges was based upon anything more than Leach's unfavorable recommendation dated March 9, 1972 and containing no mention of the alleged "forgery."

In summary, the court finds that Givhan was dismissed from her job with defendants for reasons which impermissibly impinge upon her First Amendment right of freedom of speech. Hodges was not rehired by defendants under circumstances which fail to comply with the *Singleton* provisions of previous orders entered by this

court in this case. Both Givhan and Hodges are entitled to reinstatement (or an offer of reinstatement) as employees of the Western Line Consolidated School District upon terms equal or no less favorable than those plaintiffs would now be enjoying had they not been wrongfully terminated from defendants' employ.

Both plaintiffs are also entitled to back pay mitigated by their taxable earnings since the date of the termination of their employment with the defendant. Certain evidence was introduced at the trial concerning the extent of plaintiffs' monetary damages, but the court is unable to ascertain the proper amount of back pay due plaintiffs from the present state of the record. Accordingly, counsel will be directed to confer in an attempt to reach an agreement concerning the proper amount owed plaintiffs as a back pay award, failing which the court will received additional evidence in the nature of affidavits as to plaintiffs' earnings since their discharge.

Plaintiffs are likewise entitled to reasonable attorneys' fees pursuant to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, as well as their costs herein. Counsel will be directed to confer concerning the proper amount of the attorneys' fees award. Failing agreement by counsel on this point, the court will determine a proper award.

An order will be entered in accordance with the foregoing.

This 2nd day of July, 1975.

/s/ Irma R. Smith
United States District Judge



## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 75-3485

---

D. C. Docket No. CA-GC-66-1-S

HENRY B. AYERS, *et al.*,
*Plaintiffs,*

versus

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,
*Defendants-Appellants,*

versus

MS. BESSIE B. GIVHAN, *et al.*,
*Plaintiffs-Intervenors-Appellees.*

*Appeal from the United States District Court*
*for the Northern District of Mississippi*

Before GEWIN, RONEY and HILL, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs-intervenors-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 18, 1977

RONEY, Circuit Judge, concurring specially.
Issued as Mandate:



## APPENDIX D

## UNITED STATES COURT OF APPEALS
## FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel. 504-588-0514
600 Camp Street
New Orleans, La. 70120

October 27, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-3485—HENRY B. AYERS, ET AL. v. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT v. MS. BESSIE B. GIVHAN, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

** on behalf of appellees, Ms. Bessie B. Givhan,

cc: Mr. J. Robertshaw
Mr. James L. Robertson
Messrs. Fred Banks, Jr.
Nausead Stewart
Phillip J. Brookins